Supreme Court, U.S.
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No. 96-2034

In The

Supreme Court of the United States

October Term, 1996

SFIC PROPERTIES, INC.,

Plaintiff/Appellee/Petitioner,

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, DISTRICT LODGE 94, LOCAL LODGE 311, a/k/a IAMAWD,

Defendant/Appellant/Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the arbitration award was supported by the language and purpose of the collective bargaining agreement; was authorized by the scope of authority entrusted to arbitrators by the contract; and was in response to the issues submitted to the arbitrator by the parties through their legal counsel?

2. Whether the Petitioner waived the right to challenge the jurisdiction of the arbitrator to determine that, absent just cause, a discharge could properly be vacated?

PARTIES TO THE PROCEEDING

All parties to this proceeding are listed in the above caption. The parent company of Plaintiff/Appellee/Petitioner SFIC Properties, Inc. ("SFIC") is Santa Fe (U.S. Holdings) Inc.

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BASIS FOR JURISDICTION

Respondent agrees that the basis for jurisdiction, as described by Petitioner, is accurate. The judgment of the United States Court of Appeals sought to be reviewed was entered on December 27, 1996. SFIC (herein "Petitioner SFIC") filed a Petition for Rehearing and the order denying the petition was entered on March 10, 1997. This Court has jurisdiction to review the above judgment, by writ of certiorari, pursuant to 28 U.S.C. § 1254.

STATEMENT OF THE CASE

On December 15, 1994, The Honorable James M. Ideman, United States District Judge for the Central District of California, granted Petitioner's Motion For Summary Judgment, denied cross-motion by Respondent International Association of Machinists and Aerospace Workers, District Lodge No. 94 and Local Lodge No. 311 (herein "Respondent Union") and Julio Rodriguez (herein "Rodriguez") for summary judgment, and vacated the arbitration award. (Appendix at App. 15). Respondent Union and Rodriguez, in whose favor the arbitration award was rendered, then appealed to the Ninth Circuit Court of Appeals. As stated above, the decision of the Ninth Circuit reversing the District Court ruling was entered December 27, 1996, and Petitioner's application for rehearing was denied March 10, 1997.

The underlying dispute involved the discharge of Rodriguez for alleged sexual harassment. (Appendix at App. 24). Both parties willingly submitted to arbitration which took place on June 3, 1992 before Arbitrator George E. Marshall, Jr., Esq. At no time, until the filing of

post-hearing briefs, did Petitioner SFIC suggest that the arbitrator lacked jurisdiction to determine that just cause was required to effect a termination and that such did not exist in this case. At the hearing, the parties were unable to agree on the precise language of the issues to entrust to the arbitrator. The parties agreed to submit a separate statement of issues and the arbitrator was authorized to frame the issues he felt appropriate after review of the entire evidentiary record and post-hearing briefs. (*See*: EX 6 to motion by Petitioner SFIC for summary judgment [CR 4] – Excerpt No. 3).

The issues that were submitted are as follows:

A. Petitioner SFIC's Statement.

"Did the Company violate the collective bargaining agreement in the terminaiton of Julio Rodriguez?" (Employer's Post-Hearing Brief, pg. 1, lns. 26-27, EX 1 to CR 12).

B. Respondent Union's Statement.

"1. Whether the Employer had just cause to terminate the employment of Grievant Julio Rodriguez on or about December 13, 1991?

"2. If the answer to the above issue is in the negative, what is the appropriate remedy?" (Union's Post-Hearing Brief, ¶ 3, pg. 3, lns. 7-20).

Following conclusion of the hearing, both parties filed written briefs. (UX 1 and UX 2 attached to Declaration of Herbert M. Ansell – CR 12). The arbitrator otherwise took the case under submission.

On April 11, 1994, the arbitrator issued his Decision (Excerpt No. 1) holding, *inter alia*, as follows:

(1) The Company did violate the collective bargaining agreement when it terminated Grievant Julio Rodriguez for the following reasons supported by the evidence:

"(a) Sufficient or just cause will be inferred in all modern day collective bargaining agreements which do not contain an express 'just cause' standard for discharge provisions.

"(b) There is sufficient evidence in the record to infer and conclude the parties intended to have a 'cause' standard for discharge when they indicate in their labor agreement '*seniority is lost when service is interrupted according to the following . . . (e) Dismissal for cause.* (JX 1, Art. IX, "Seniority."). (Emphasis added).

"(c) The Employer was required to give proper notice to the Grievant as to the reasons he was being investigated for possible discharge; and opportunity to remedy the misconduct."

(2) The arbitrator ordered Rodriguez reinstated and extended to the parties an opportunity to attempt agreement as to the amount of financial compensation due and owing.

Review of the briefs of the parties makes clear that the issue of whether "just cause" was to be inferred in the contract was squarely entrusted to the arbitrator, and full argument was tendered therewith. ***Neither the brief of the Employer or the Union suggested that this issue was withheld from the Arbitrator.***

Dissatisfied with the arbitration award of George E. Marshall, Jr., Petitioner SFIC filed a Complaint To Vacate

Arbitrator's Award with the U.S. District Court, Central District of California on or about July 21, 1994. (CR 1). Specifically, Petitioner SFIC alleged that the arbitrator went outside the collective bargaining agreement and exceeded his authority by establishing new terms and conditions to the agreement which were never agreed upon by the parties. In this regard, the arbitrator had concluded that the contract contained a just cause requirement for termination, and a requirement that the employee be given notice of that wrongdoing and the opportunity to correct the behavior prior to his termination. Petitioner SFIC alleged that none of these requirements appear in the collective bargaining agreement between the parties.

On or about December 15, 1994, U.S. District Judge James M. Ideman issued an order granting Petitioner's Motion For Summary Judgment, vacating the arbitration award of George E. Marshall, Jr. and denying Respondent's Motion For Summary Judgment (CR 25). Said order provided, *inter alia*, as follows:

> "The court finds that the arbitrator exceeded his authority in reaching his decision. The decision did not draw its essence from the collective bargaining agreement because the arbitrator inferred a just cause standard and a requirement of notice into the collective bargaining agreement when it was clear that the collective bargaining agreement gave Plaintiff unlimited control over discharge. Therefore, the court grants Plaintiff's Motion For Summary Judgment and vacates the arbitrator's award. Defendant's Motion For Summary Judgment is denied. The court does not now make a determination as to attorney's fees. Plaintiff is

ordered to file a motion seeking attorney's fees no later than January 27, 1995."

The court also filed a judgment on December 15, 1994 (CR 27). On or about December 15, 1994, the court filed a Statement Of Uncontroverted Facts And Conclusions Of Law. (CR 26). In said statement, as part of the Conclusions of Law, the court relied on *Local Union No. 2812 v. Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), in which the court had vacated an arbitration award which had inferred a limitation on the Employer's right to discharge. The *Missoula White Pine Sash* court, in this regard, relied on the fact of the inclusion of a provision similar to the managment provision in this case, which conferred upon the Employer the exclusive right to discharge and discipline an employee. The court concluded that the intent of the parties was that a showing of just cause would not be required for termination. The Court provided, *inter alia*:

> "10. As the court suggested, '[c]ause for discharge is too important a matter to be thought to have been overlooked, and too customarily dealt with expressly, for us to assume that the parties either unconsciously left it out, or intentionally omitted it, thinking it to be implicit.' *Id.* at 1387.
>
> "11. The Ninth Circuit's holding in *Dickeson v. DAW Forest Products Co.*, 827 F.2d 627 (9th Cir. 1987), is distinguishable from the court's holding in the present case.
>
> "12. The arbitrator exceeded his authority in reaching his decision in the present case. The decision did not draw its essence from the collective bargaining agreement because the arbitrator inferred a just cause standard and a

> requirement of notice into the collective bargaining when it was clear that the collective bargaining agreement gave plaintiff unlimited control over discharge."

On or about March 13, 1995, the United States District Court entered an order granting Respondent's Motion For Reconsideration of order re attorney's fees. (CR 35). As part of said order, Petitioner was barred from seeking attorney's fees as a prevailing party in the district court action.

Respondent Union and Rodriguez appealed to the Ninth Circuit Court which issued a decision entered December 27, 1996. The decision reversed the district court and the Petition for Rehearing filed by Petitioner was denied March 10, 1997.

SUMMARY OF ARGUMENT

As pointed out in the discussion below, the district court judge clearly exceeded his scope of judicial review with regard to his order vacating the arbitration award. *First*, the Petitioner waived its rights to vacate the arbitration award when it entrusted to the arbitrator the issue of whether the discharge of Mr. Rodriguez was proper under the collective bargaining agreement. *Second*, applicable case law shows that the award was clearly supported by the language and purpose of the agreement. *Third*, applicable case law in the Ninth Circuit and other jurisdictions clearly hold that the arbitrator's inference of a just cause standard is appropriate under the circumstances of the instant case. *Fourth*, the decision of the Ninth Circuit Appellate Court is consistent with the well

established teachings of this Court and the federal appellate courts since the *Steel Workers* trilogy in 1960.

ARGUMENT

A. THE ARBITRATION AWARD WAS SUPPORTED BY THE LANGUAGE AND PURPOSE OF THE COLLECTIVE BARGAINING AGREEEMENT; WAS AUTHORIZED BY THE SCOPE OF AUTHORITY ENTRUSTED TO ARBITRATORS BY THE CONTRACT; AND WAS IN DIRECT RESPONSE TO THE ISSUES SUBMITTED TO ARBITRATOR MARSHALL BY THE PARTIES THROUGH THEIR LEGAL COUNSEL. ACCORDINGLY, THE DISTRICT COURT'S ORDER VACATING AWARD, GRANTING PETITIONER'S AND DENYING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT WAS PROPERLY REVERSED. FINALLY, THE PARTIES TO THE CONTRACT, INCLUDING RODRIGUEZ, EXPRESSLY SUBSTITUTED ARBITRATION FOR THE STRIKE AND/OR LOCKOUT AS A MEANS OF RESOLVING INDUSTRIAL DISPUTES. THIS ALONE IS A STRONG BASIS FOR INFERRING THAT RODRIGUEZ, THROUGH HIS BARGAINING AGENT, SELECTED BINDING ARBITRATION AS A MEANS OF RESTRICTING TERMINATIONS NOT BASED ON JUST CAUSE, RATHER THAN THE STRIKE OR LOCKOUT.

It is elementary that the national interest favors the peaceful and orderly resolution of disputes through the process of arbitration and the avoidance of work stoppages. The commitment to refrain from strike action is recognized as an adequate consideration to support an

undertaking by the Employer to submit grievance disputes to the process of arbitration. As stated in *Boy's Market v. Cook's Union*, 398 U.S. 235, 247-248:

> "As we have previously indicated, a no-strike obligation express or implied is the quid pro quo for an undertaking by the Employer to submit grievance disputes to the process of arbitration."

In *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, the Court stated:

> "Complete effectuation of the federal policy is achieved when the agreement contains both an arbitration provision for all unresolved grievances and an absolute prohibition of strikes, the arbitration agreement being the quid pro quo for the agreement not to strike."

A judge is not permitted to substitute his own contractual interpretation for that of the arbitrator. *United Paper Workers Intl. Union v. Misco, Inc.*, 484 U.S. 29, 37-38, 126 LRRM 3113 (1988); *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960).

In *O'Malley v. Wilshire Oil Co.*, 57 Cal. 2d 482, the California Supreme Court said: "A heavy presumption weighs the scales in favor of arbitrability."

In *Machinists v. Howmet Mfg. Co.*, 366 F.2d 1249 (9th Cir. 1972), the Court stated:

> "The Supreme Court has established a strong presumption in favor of arbitration as the preferred method of settlement of industrial disputes. . . . Although arbitration is a matter of mutual agreement between the parties, and they

> may choose to exclude certain areas of contention from the arbitration process, the standard set by the court for finding a dispute non-arbitrable, is a strict one. ***There must be either an 'express provision excluding a particular grievance from arbitration' or 'the forceful evidence of a purpose to exclude the claim from arbitration. . . . ' The issue is therefore a simple one: is there evidence of a purpose to exclude those grievances from arbitration so that the heavy presumption in favor of arbitration is overcome.***" (Emphasis added).

See also: *Local 1309 v. Aztec Bus Lines*, 654 F.2d 642, 108 LRRM 2412 (9th Cir. 1981); *Irvin H. Whitehouse, etc. v. Nubbt*, 659 F.2d 830, 108 LRRM 2578.

The *Labor-Management Relations Act* (1947), 61 Stat. 154, 29 U.S.C. § 173(d) provides: "Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement." *See also*: *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567.

Several well-reasoned federal and California decisions make clear the strong presumption of validity that attaches to arbitration awards. In *Kroger Co. v. IBT*, 380 F.2d 728 (6th Cir.) the court stated: "A court cannot substitute its judgment or interpretation of a collective bargaining agreement for that of an arbitrator. The fact that the court might have applied a different interpretation . . . is no reason for setting aside the arbitrator's award." *See also*: *Timken v. Local 1233, Steelworkers*, 482 F.2d 1012 (6th Cir.).

In *Baldwin Montrose Chemical Co. v. URW*, 383 F.2d 796, the court stated that the test to determine whether an award should be upheld is as follows: "The standard for that inquiry . . . is whether the award was so unfounded in reason and in fact, so unconnected with the wording and purpose of the collective bargaining agreement so as to manifest an infidelity to the obligation of the arbitrator." *See also*: *Railroad Trainmen v. Central of Georgia*, 415 F.2d 403.

In *Western Iowa Port Co. v. Natl. Brotherhood of Packing House & Dairy Workers*, 366 F.2d 275, the court stated:

> " . . . The issues raised by the union relate directly to the agreement, are on their face governed by the agreement, and the interpetation placed on the pertinent parts of the agreement by the arbitrator are permissible. The arbitrator acted within the scope of his authority under the agreement in rendering the award. This court as well as the district court, need not and cannot pass upon the merits of the award."

See also: *UAW v. White Motor Co.*, 505 F.2d 1193 (8th Cir. 1974); *H.K. Porter v. United Saw, etc. Workers*, 333 F.2d 5596 (3d Cir.); *Independent Petroleum Workers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, this court stated:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts have the final say on the merits of the awards. . . . The arbitrators under these collective agreements are indispensable agencies in a

> continuous collective bargaining process. They sit to settle disputes at the plant level, disputes that require for their solution knowledge of the custom and practices of the particular factory or of a particular industry as reflected by particular agreements."

Thus, since 1960, and the orignal *Steelworker* decisions, the role of the courts in reviewing an arbitration decision has been seen as limited solely to determining whether the decision "draws its essence from the collective bargaining agreement." The courts do not reweigh the evidence relied upon by the arbitrator in support of the award. *Cannon v. Consolidated Freightways Corp.*, 524 F.2d 290; *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593; *Kroger Co. v. IBT*, 380 F.2d 728 (6th Cir.); *Timken v. Local 1223, Steelworkers*, 482 F.2d 1012 (6th Cir.); *Ludwig Harold Mfg. Co. v. Fletcher*, 405 F.2d 1123; *Criggor v. Allied Chemical Corp. etc.*, 500 F.2d 1218 (4th Cir.); *Baldwin Montrose Chemical Co. v. URW, supra.*

In *Truck Drivers & Helpers Union v. Ulry-Talbert Co.*, 330 F.2d 562, 56, 55 LRRM 2979 (8th Cir. 1964), the Court of Appeals defined the "***essence***" standard to mean that judicial inquiry by the district court is to be "***limited to the determination of whether or not the parties had agreed to give the arbitrator power to make the award which he attempted to make.***" (Emphasis added).

The standard has been phrased by some courts thusly: whether the decision is "without foundation in reason or fact." *Brotherhood of Railroad Trainmen v. Central of Georgia Railway Co.*, 415 F.2d 403, 411 (5th Cir. 1969). This has been interpreted as requiring only that ***"the award must, in some logical way, be derived from the***

wording or purpose of the contract." *Id.* at 412. *United Steelworkers of America v. Enterprise Wheel & Car Corp., supra.* (Emphasis added).

See: *Steelworkers v. Enterprise Wheel & Car Co., supra; United Paper Workers Intl. Union v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1988) (" . . . as long as the arbitrator is even arguably construing or applying the contract in acting within the scope of his authority, *that* a court is convinced he committed a serious error does not suffice to overturn his decision."). (Emphasis added).

See to same effect: *Lynchberg Foundry Co. v. United Steelworkers of America*, 404 F.2d 259, 69 LRRM 2878; *Lodge No. 12, District 37, IAM v. Cameron Iron Workers*, 292 F.2d 112, 48 LRRM 2516; *Ludwig Harold Mfg. Co. v. Fletcher*, 405 F.2d 1123, 70 LRRM 2368; *Criggor v. Allied Chemical Corp. etc.*, 500 F.2d 1218, 86 LRRM 3162 (4th Cir.).

In *Stead Motors v. IAM*, 886 F.2d 1200, 132 LRRM 2689 (9th Cir. 1989), the Ninth Circuit stated:

> ***" . . . If, on its face, the award represents a plausible interpretation of the contract, judicial inquiry ceases and the award must be enforced.*** This remains so even if the basis for the arbitrator's decision is ambiguous and notwithstanding the erroneous of any factual findings or legal conclusions." (In accord: *Sheetmetal Workers v. Arizona Mechanical and Stainless Inc.*, 863 F.2d 647, 653). (Emphasis added).

Even as to errors of law, the review is very limited. Absent "manifest disregard" of the law, an award should be confirmed by the court. However, "manifest disregard" presupposes "something beyond and different from a mere error in the law or failure on the part of the

arbitrators to understand or apply the law." *Saix Steamship Co. v. Multifacs Intl. Traders Inc.*, 375 F.2d 577, 582 (2d Cir. 1967).

"The scope of review of an arbitrator's decision in a labor dispute is extremely narrow." *Federated Department Stores v. United Food & Commercial Workers Union Local 1442*, 901 F.2d 1494, 1496 (9th Cir. 1990). Arbitration awards are upheld so long as they represent a "plausible interpretation of the contract." *Phoenix Newspaper, Inc. v. Phoenix Mailers Union Local 752*, 989 F.2d 1077, 1080 (9th Cir. 1993). "A review in court is bound – under all except the most limited circumstances – to defer to the decision of the arbitrator even if . . . that . . . decision finds the facts and states the law erroneously."

An award draws its essence from the collective bargaining agreement when it is based on language in the collective bargaining agreement. *See*: *Stead*, 886 F.2d at 1205 n.6 ("This term [fails to draw its essence] is reserved for those egregious cases in which a court determines that the arbitrator's award ignored the plain language of the contract, that he manifestly disregarded the contours of the bargain expressed in outline by the collective bargaining agreement."); *Jasper Cabinet Co. v. United Steel Workers of America, AFL-CIO, etc.*, 77 F.3d 1025, 1028 (7th Cir. 1996), ("We will uphold an arbitrator's award based upon a misreading of the contract so long as the arbitrator's interpretation is derived from the language of the contract."); *Sullivan v. Lemoncello*, 36 F.3d 676, 683 (7th Cir. 1994), ("All that is required is that the arbitrator's interpretation of the collective bargaining agreement is derived from the language of the requirement."); *Loveless v. Eastern Airlines, Inc.*, 681 F.2d 1272, 1279 (11th Cir.

1982), (awards not drawing their essence from the collective bargaining agreement reflect neither the language of the collective bargaining agreement nor the intent of the parties.).

Here, the decision of the arbitrator was squarely premised upon interpretation and application of clear language in the context of the facts as determined by the arbitrator and applicable legal principles. *See*: *Amalgamated Clothing and Textile Workers Union v. Ratner Corp.*, 602 F.2d 1363, 102 LRRM 2571 (9th Cir. 1979).

The Ninth Circuit Court, in the instant case, said the following: "The arbitrator's first rationale – just cause requirements are inferred from all modern day collective bargaining agreements which do not contain an express provision" – is also a sufficient basis for upholding the award. In *Federated*, the Ninth Circuit Court held that an award draws its essence from the collective bargaining agreement even when it is based not on the language in the collective bargaining agreement, but rather on the arbitrator's understanding of the industry and practices, i.e., industrial common law. 901 F.2d at 1497. *See also*: *United Food & Commercial Workers International, AFL-CIO, Local Union No. 634 v. Gold Star Sausage Co.*, 487 F.Supp. 596, 600 n.7 (D. Colorado 1980), (" 'Industrial common law' relied on by arbitrators need not be particular to a certain industry, but can include concepts common to labor contracts").

In this regard, the court stated also: "As it is very common for arbitrators to infer just cause requirements from collective bargaining agreements which are silent on the issue, the award in the instant matter drew its essence

from the collective bargaining agreement between SFIC and the Union. *See also*: *Smith v. Kerrville Bus Co.*, 709 F.2d 914, 917 (5th Cir. 1983), ('In instances where the language of a collective contract does not explicitly prohibit dismissal, except for just cause, arbitrators typically infer such prohibitions from seniority clauses or grievance and arbitration procedures.')"; *Zellenbach Paper Co.*, 73 LA (BNA) 1140, 1142 (1979) (Sabo, Arb.), ("Even where a contract fails to include any general limitations as to the right to discharge, arbitrators have concluded that a just cause restriction is implied in a modern collective bargaining agreement."); *Kenneth A. Sprang, Beware Of The Toothless Tiger: A Critique Of The Model Employment Termination Act*, 43 Am. U.L. Rev. 849, 910 (1994), ("So strong is the tradition of just cause in arbitral jurisprudence that many arbitrators have inferred the existence of a just cause standard in agreements that do not expressly state such a standard."), (" . . . If a just cause requirement is missing from the agreement, and the arbitrator infers its existence from the seniority clause or grievance and arbitration provisions."). The arbitrator's conclusion concerning a broad practice of inferring just cause requirements is well supported and under *Federated*, it is submitted that the award draws its essence from the collective bargaining agreement. *See*: *Federated*, 901 F.2d at 1496.

The general principles regarding the limited role of reviewing courts are deeply embedded in labor and arbitration jurisprudence.

B. ARBITRATORS AND FEDERAL COURTS CONSISTENTLY INFER A LIMITATION OF THE EMPLOYER'S POWER TO DISCHARGE IN THE ABSENCE OF EXPRESS CONTRACT LANGUAGE WHICH EXCLUDES THE ISSUE OF DISCHARGE FROM THE ARBITRATION PROCESS.

In the instant case, the issue of the propriety of Mr. Rodriguez' discharge was entrusted to the arbitrator. While the phraseology of the submission questions propounded by counsel for the Union and Employer respectively differed, at no time was it ever contended prior to or during the arbitration hearing that the arbitrator lacked the jurisdiction to interpret the language of the agreement and determine whether it was appropriate to conclude that the Employer's right of discharge was conditioned on demonstrating proper cause and that of proper notice.

The principle that arbitrators will generally infer such limitation has been demonstrated in a number of arbitration awards. In *Van Waters v. Van Waters & Rogers,* 102 LA (Lab. Arb.) 609 (Dec. 15, 1993) – Arbitrator Marvin Feldman, the arbitrator, stated the following:

> "The Company has also argued in this particular case that the Management Rights clause does not contain a 'just cause' provision and that the Union having negotiated different contracts in and around this area of the country, knows full well that such language exists in contracts and therefore could have negotiated such language."

Rejecting this argument, the arbitrator stated:

> " . . . The general rule is that a Management Rights clause, whether or not it contains a 'just cause' or 'cause' provision in its four corners, is unimportant. ***Overwhelmingly, arbitrators have implied 'cause' or 'just cause' language in the Management Rights clause. That is true whether it is written in the four corners of that paragraph or not. If the Company had intended not to have such language or meaning, then the parties would have negotiated that 'cause' and 'just cause' are not a part of the arrangement between the parties and stated in clear and unambiguous language that such language or thought is not to be considered.***" (Emphasis added).

In *Pfizer, Inc.*, 79 LA 1225 (Arbitrator Melvin Newmark) (1982), the Arbitrator held that a "just cause" limitation was properly to be inferred. The Arbitrator stated in this regard, *inter alia: **"It is part of the 'common law' of industrial relations – one of the tacit assumptions underlying all collective agreements – that an employer shall not exercise arbitrarily his power to discipline workers."*** (Emphasis added).

In *Higgins Industries, Inc.*, 24 LA 453, 455, (Arbitrator Morvant) (1955), it was held as follows:

> "The phraseology 'employees shall lose all seniority rights if they are discharged for cause' – restricts or limits management's right to discharge 'for cause'. . . . The labor-management agreement reduces to writing the rights of the individual worker and protects those rights against any arbitrary or unfair action on the part of the . . . Company."

Again, in a subsequent decision, *Higgins Industries Inc.*, 25 LA 439 440, Arbitrator Hebert considered the same contention and concluded: ***"Despite the absence of a contract clause requiring that discharges be for cause, the employer may not discharge without just cause."*** (Emphasis added).

In *Cameron Iron Works, Inc.*, 25 LA 295 (1955), Arbitrator Bowles held that the standard of "just cause" is implied in a modern collective bargaining agreement.

In *Velsicol Chemical Corp.*, 52 LA 1164 (1959), Arbitrator Oppenheim stated: ***"An employer does not have an unrestricted right to discipline even though a contract or collective bargaining agreement does not specifically limit such right."*** (Emphasis added).

In *Rohr Industries, Inc.*, 78 LA 981, 982 (1982), Arbitrator Sabo summarized the status of the arbitration common law on this point as follows: ***"Today, even where a contract fails to include any general limitations as to the right to discharge, arbitrators have concluded that a just cause restriction is implied in modern collective bargaining agreements in the absence of a provision to the contrary."*** (Emphasis added).

In *Fort Wayne Community Schools*, 78 LA 928 (Arbitrator Clarence Deitsch – 1982), the Arbitrator inferred a "just cause" limitation, stating, *inter alia:*

> "An employer may not use 'reserved rights' to destroy other rights specified in the contract. The Employer's position concerning discharge without showing cause threatens and otherwise compromises the employee rights specified in Appendix B of the Policy Book, particularly

> employee rights stemming from seniority. As Arbitrator Donnaly observed 'if the Company can discharge without cause, it can layoff without cause. It can recall, transfer or promote in violation of the seniority provisions simply by invoking its claimed right to discharge. ***Thus, to interpret the agreement in accord with the claim of a company would reduce to a nullity the fundamental provision of a labor-management provision, the security of a worker in his job.***' *Atwater Mfg. Co.*, 13 LA 747, 749." (Emphasis added).

See to same effect: *Gaten Pepsi Cola Bottling Co.*, 75 LA 154 (Arbitrator Kennan – 1980) ("*Based on an interpretation of various provisions of the contract read in conjunction with the management rights clause, and the contract as a whole, the Arbitrator finds that despite the lack of any express provision providing that discharges shall be only for 'cause' or 'just cause' a proper interpretation of the contract in its entirety compels the conclusion that the company may discharge a regular employee only for 'cause'*; *Cleveland Construction*, 96 LA 354 (Arbitrator Dworkin); *Pacific Power and Light Co.*, 89 LA 283 (Arbitrator Sinicropi – 1987) holding that the propriety of a probationary employee's discharge was to be determined by 'just cause' standard); *Essroc Materials*, 99 LA 664 (Arbitrator John Murphy – 1992). Arbitrator held that just cause was to be implied as a requirement to support the discharge decision; *Village of Herkimer*, 84 LA 1298.

Particularly appropriate is the language in *Paragon Bridge and Steel Co.*, 44 Lab. Arb. 361, 371, an arbitration decision. It is there stated:

> "Inherent in any agreement is an implied undertaking that neither party will do anything which will have the effect of destroying the right of the other party to receive the fruits of its contract. (Citing case). This implied term is commonly applied in commerical agreements. ***It has application with at least equal force in collective bargaining agreements based on the public policy of encouraging collective bargaining.***" (Emphasis added).

In the Law Review article, "*Reflections On Labor Arbitration,*" 723 Harv. Law Rev. at page 1482, ***Professor Archibald Cox suggested that a company in agreeing to pay the wage scales, fringe benefits and observe the other conditions in the contract beneficial to the employees impliedly agrees not to take any action that would destroy the right of its employees to enjoy the fruits of the contract. ". . . In every contract there exists an implied covenant of good faith and fair dealing." Professor Cox thus reasons that an employee can arbitrate a discharge, even when the contract is silent as to just cause, inasmuch as a wrongful discharge would constitute a deprivation of his benefits to the contract.***

The great weight of authority among arbitrators is to interpret the contract as Arbitrator Marshall did in this case.

As in the instant case, federal courts have confronted squarely a number of instances in which the employer has attempted to overturn arbitration awards that inferred a requirement of just cause before an employee could be terminated properly.

In *Los Angeles Paper Bag Co. v. Printing Specialties and Paper Products Union*, 345 F.2d 757, 59 LRRM 2427 (9th Cir. 1965), the contract provided that employees could be disciplined for an unauthorized strike without recourse to arbitration. The employer discharged several employees under that clause and refused to arbitrate the discharges. The ninth circuit noted that the employer's position of non-arbitrability was based on its unilateral determination that an unauthorized strike had occurred, when in fact the contract did not authorize the employer to make such determination. The court concluded that the question as to whether the employees had engaged in an unauthorized strike was a proper matter for arbitration.

In *Johnson-Tombigbee Mfg. Co. v. Local 2462*, 596 F.2d 126, 101 LRRM 2486 (5th Cir. 1979), the company urged the discharge was nonarbitrable based on its unilateral determination that just cause existed. The court held that the contract did not give the employer the right to determine just cause; that if the company wished such right, it should have attempted to negotiate such a contract.

In *Egan v. Wells Fargo Alarm Svs.*, 23 F.3d 1444, *cert. denied*, 115 S.Ct. 319, 146 LRRM 2443 (8th Cir. 1994), the employer, as in the instant case, challenged an arbitration award because the contract did not contain express language limiting discharges to "just cause." The court granted summary judgment confirming the award. The court in this regard pointed to several contract protections that were necessarily undermined if the employer could defeat them by a discharge at will ("continued employment, protection against lockouts, seniority rights pertaining to filling vacancies, job creations, decreases in

force, layoffs and rehiring after layoffs, wage protections and other benefits.")

The court concluded: "***While the Agreement does not contain an explicit 'just cause' or 'good cause' provision, the clear implication of Article XIV is that non-probationary union employees, in contrast to probationary employees, may not be terminated at will or without good cause.***" (Emphasis added).

In *Winery Distillery and Allied Workers Union L. 186 et al. v. E & J Gallo Winery*, 857 F.2d 1384, 128 LRRM 2631 (9th Cir. 1988), the court upheld arbitration of the discharges of several employees who allegedly engaged in violent strike misconduct. The court, in this regard, stated:

> " . . . The employees, covered here by the collective bargaining agreement, are entitled as a matter of contract and federal labor law policy to the benefit secured on their behalf by their union. One of those important rights is to have unresolved grievances decided by an arbitrator. *C.F. Johnson – Tombigbee Mfg. Co. v. Local 2462*, 596 F.2d 126, 101 LRRM 2486 (5th Cir. 1979) (construing exclusionary clause strictly 'in order to give effect to our national policy in favor of arbitration')."

It is clear that federal courts, when confronting the issue of discharges under a contract that does not expressly specify "good cause," have unhesitatingly implied the requirement of "just cause" in order that the rest of the contract protections not be rendered meaningless, and that the national policy favoring arbitration of all disputes be given full deference.

C. APPELLEE SFIC WAIVED ANY RIGHT TO VACATE THE ARBITRATOR'S AWARD. WHERE, AS IN THE INSTANT CASE, ANY ISSUE, INCLUDING THE SCOPE OF THE ARBITRATOR'S JURISDICTION, HAS BEEN UNCONDITIONALLY SUBMITTED AND THE PARTIES ARE BOUND BY THE ARBITRATOR'S DECISION, SUCH DETERMINATION RELATING TO THE ARBITRATOR'S JURISDICTION IS ENTITLED TO THE SAME BROAD AREA OF DEFERENCE AS ANY ASPECT OF THE ARBITRATION AWARD.

Ficek v. So. Pacific Co., 338 F.2d 655 (9th Cir.); *Lattimer-Stevens Co. v. United Steelworkers of America, etc.*, 913 F.2d 1166, 135 LRRM 2573 (6th Cir. 1990) (" . . . ***The extraordinary deference given to an arbitrator's ultimate decision on the merits applies equally to an arbitrator's decision that the parties have indeed submitted a particular issue for arbitration.***") (Emphasis added); *Pack Concrete, Inc. v. Cunningham, etc. et al.*, 866 F.2d 293, 130 LRRM 2490 (9th Cir. 1989) (" . . . ***We now hold that an arbitrator's interpretation of the scope of the issues submitted to him is entitled to the same deference accorded his interpretation of the collective bargaining agreement.***") (Emphasis added); *High Concrete Structures v. Local 166*, 879 F.2d 1215, 131 LRRM 3152 (3d Cir. 1989).

In the instant case, both parties entrusted to the arbitrator the issue of whether the discharge of Mr. Rodriquez was proper under the collective bargaining agreement. While phrased slightly different, both the Employer and Union made an unqualified submission to the arbitrator of this issue. The first time that the issue of an "unqualified right" to fire employees for any reason was raised by Employer's counsel was in its post-hearing

brief. Even then, the brief does not contain any suggestion that the arbitrator lacked power or authority to imply a just cause provision. It simply stated, "Therefore the Company has the exclusive unfettered right to terminate Mr. Rodriguez, with or without cause. On this basis alone, the arbitration award ***should go to the Company.***" (Emphasis added). The Employer argued the point and lost. In the district court below, for the first time, it suggests that the arbitration award somehow is invalid.

It is submitted that by clear, well-established authority the arbitrator's decision, in effect, that he had authority to imply a just cause requirement, and thus invalidate the discharge, is entitled to the same weight and deference as any other aspect of his award. In short, having submitted the issue of "just cause" to the arbitrator, the Employer cannot be heard to urge that because it is disappointed in the award, the award can be properly attacked.

D. THE PETITIONER HAS NOT DEMONSTRATED ANY JUDICIAL SUPPORT FOR THE PROPOSITION THAT IT HAD UNRESTRICTED POWER TO TERMINATE RODRIGUEZ IN THE ABSENCE OF "JUST CAUSE."

The decision in *Local Union 2812 v. Missoula White Pine Sash*, 734 F.2d 1384 (9th Cir. 1984), *cert. denied*, 470 U.S. 1085 (1985), heavily relied upon by Petitioner, is inapposite to the instant case. Moreover, it was distinguished by the Ninth Circuit Court below. In *Missoula White Pine Sash*, the company had the express contractual right as follows: "The sole and exclusive right to hire, discipline and discharge any employee." The issue

framed in that case was whether the employer could ***lay off*** (later reclassified as discharge) without cause.

There are two essential points of difference between the *Missoula* case and the instant case.

1. In the *Missoula* case, the issue of "just cause" initially arose in the context of a layoff – not a discharge. The contractual protection available in the instance of "layoff" was not as strong as the seniority language in the instant case in the context of a "discharge."

2. In *Missoula,* the collective bargaining agreement provided expressly that the company had the sole and exclusive right to hire, discipline and discharge any employee.

In the instant case, the collective bargaining agreement provides, *inter alia,* that "Except as specifically modified . . . in this agreement, the Company retains the exclusive right to manage the business of the facility. . . . Among those exclusive rights of the Company . . . is management's right to . . . layoff . . . discipline and discharge employees; . . . ***provided that the exercise of the above prerogatives will not infringe on rights protected in this agreement.***" (Emphasis added).

And again: "Except as otherwise limited herein, such matters are the responsibilities and prerogatives of the Company . . . ***except as specifically limited, modified or delegated by the terms of this agreement.***" (Emphasis added). (*See*: Machinists Maintenance Agreement – Ex 2 to CR 4). Thus, the Employer does not have the unfettered right to discharge without just cause, because to permit this would be to infringe upon the important

rights available to employees under the contract, e.g., wages, medical benefits, pension, holidays, vacation, etc.

In *Dickeson v. DAW Forest Product Co.*, 827 F.2d 627 (9th Cir. 1987), the ninth circuit implied a finding of "just cause" for discharge. The court concluded that the management rights catch-all provision was limited by the provision in the grievance procedure which expressly required reinstatement if a discharge was found to be lacking "just cause" in support thereof. The court in *Dickeson* also stated:

> "We agree that it is not for this court to subvert the collective bargaining process by remaking the collective bargaining agreement . . . and we do not do so here. ***Contrary-wise we find it difficult to imagine a meeting of the minds between an employer and a union authorizing an employer to discharge an employee without good cause. Employee's security goes to the very essence of a collective bargaining agreement.*** (Citations). The effect of unbridled discretion to discharge is particularly severe in such cases as this where an employee has worked for the same employer for many years . . . . ***In light of the requirements of the grievance procedure, and our reluctance to infer that a union would forego job security for its employees, we conclude that the collective bargaining agreement confers a right to discharge only for good cause.***" (Emphasis added).

We submit that the requirement of reinstatement found in the grievance procedure in the *Dickeson* contract is no more significant than the requirement of good cause before ending an employee's seniority; and the implied

right of non-probationary employees to a showing of "just cause" in the instant case.

In *Egan v. Wells Fargo Alarm System*, 23 F.3d 1444, *cert. denied*, 115 S.Ct. 319 (8th Cir. 1994), the express disparate treatment of probationary employees and non-probationary employees was held sufficient to imply protection on the part of a non-probationary employee from discharge without cause. ***Moreover, the court reviewed the total agreement and its panoply of rights and protections, and concluded, in effect, that the loss of job without cause subverts enjoyment of such rights and protections.***

It is submitted that the Management Rights clause in the *Dickeson* contract is extremely similar in all material respects to that in the instant case. This court's decision in *Dickeson* should, therefore, control. It is clear that in *Dickeson* and the instant case, the arbitration award was based on a rational interpretation of the collective bargaining agreement.

See also: *Highland Hospital & Health Center v. American Federation of State, County & Municipal Employees*, 151 LRRM 2629 (W.D. Penn. 1996); *Local 238, I.B.T. v. Cargill, Inc.*, ___ F.3d ___, 150 LRRM 2469 (8th Cir. 1995); *Exxon Shipping Co. v. Exxon Seaman's Union*, 73 F.3d 1287, 151 LRRM 2161 (3d Cir.); *United Transportation Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 379, 148 LRRM 2796 (3d Cir. 1995).

By reason of above, Respondent Union and Rodriguez respectfully urge this Court to deny the Petition for Certiorari.

Dated: July 28, 1997

Respectfully submitted,

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